MOTION FILED
APR 30 2009

(3)

No. 08-1287

IN THE
Supreme Court of the United States

FAMILY DOLLAR STORES, INC.,

Petitioner,

v.

JANICE MORGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NATIONAL RETAIL FEDERATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

RONALD E. MANTHEY
Counsel of Record
JOEL S. ALLEN
JASON R. ELLIOTT
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
(214) 466-4000

Counsel for Amicus Curiae

222579

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

The National Retail Federation ("NRF") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. Petitioner has consented to the filing of this brief; a copy of its letter of consent has been filed with clerk. NRF files this motion because counsel for Respondents have refused to consent to the filing of this brief.

This case concerns the proper standard for determining when employees are "similarly situated" for purposes of certifying nationwide collective actions brought in cases under the Fair Labor Standards Act ("FLSA") involving the individualized assessment of "primary duty." This issue is critical to employers in the retail industry because the vast majority of those employers have hundreds or thousands of employed exempt individuals sharing the same job title who may contend, under the standards employed by some courts, that they are "similarly situated."

NRF is a retail industry organization broadly supporting the interests of its members, the vast majority of which employ individuals working in retail sales establishments, and which encompass a wide variety of industries and markets. NRF's members and the retail industry as a whole have been disproportionately targeted during the explosion of FLSA collective action suits, and the industry has a common concern with Petitioner regarding the proper basis and/or predictability with which courts have determined that large groups of employees, classified as "exempt" under the FLSA, are deemed to be "similarly situated."

As an industry umbrella organization, NRF has a unique perspective concerning the impact that this case

will have, not just on the Petitioner, but also the many other retail employers who have concerns that have been accumulated from the industry's experiences as a whole. *Amicus* writes in the hope that its broad retail industry perspective and its members' experiences may be of assistance to the Court.

Respectfully submitted,

RONALD E. MANTHEY
Counsel of Record
JOEL S. ALLEN
JASON R. ELLIOTT
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
(214) 466-4000

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING THE PETITION ..	7
I. THE LACK OF MEANINGFUL, CLEAR STANDARDS FOR ASSESSING WHEN EMPLOYEES ARE "SIMILARLY SITUATED" IN "PRIMARY DUTY" CONTEXT CREATES A MAGNET FOR WASTEFUL LITIGATION.	7
A. The FLSA's Executive Exemption, "Primary Duty" And Collective Action Provisions.	9
B. It Is Critical That The Court Define The Similarly Situated Standard To Reconcile Collective Actions With The Individualized Nature of The "Primary Duty" Analysis.	12
II. TWO-STEP REVIEW OF CERTIFICATION DOES NOT CURE THE LACK OF A CLEAR STANDARD	19
CONCLUSION	23

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Ale v. Tenn. Valley Auth., 269 F.3d 680 (6th Cir. 2001) 17, 18

Baldridge v. SBC Commc'ns, Inc., 404 F.3d 930 (5th Cir. 2005) 5, 12

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 13, 14

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 5

Comer v. Wal-Mart Stores, Inc., 454 F.3d 544 (6th Cir. 2006) 5, 12

Donovan v. Burger King, 675 F.2d 516 (2d Cir. 1982) 16

Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) 13

Grayson v. K Mart Corp., 79 F.3d 1086 (11th Cir. 1996) 3, 11

Hoffman-La Roche v. Sperling, 493 U.S. 165 (1989) 3, 12, 15

Johnson v. Big Lots Stores, Inc., 561 F. Supp. 2d 567 (E.D. La. 2008) 8, 17, 18, 20, 21

Cited Authorities

Page

Mike v. Safeco Ins. Co., 274 F. Supp. 2d 216 (D. Conn. 2003) 8

Mooney v. Aramco Servs. Co., 54 F.3d 1207 (5th Cir. 1995) 3, 4, 11, 12

Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233 (11th Cir. 2008) ..... *passim*

Morisky v. Pub. Serv. Elec. & Gas, 111 F. Supp. 2d 493 (D.N.J. 2000) 8

Reyes v. Texas EZPawn, 459 F. Supp. 2d 546 (S.D. Tex. 2006) 17, 18

Riech v. Homier Dist. Co., 362 F. Supp. 2d 1009 (N.D. Ind. 2005) 8

Rodriguez v. Farm Stores, Inc., 518 F.3d 1259 (11th Cir. 2008) 15, 17

Smith v. Heartland Auto. Servs., 404 F. Supp. 2d 1144 (D. Minn. 2005) 8

Stein v. J.C. Penney Co., 557 F. Supp. 398 (W.D. Tenn. 1983) 17

Whittlesey v. Union Carbide Corp., 567 F. Supp. 1320 (S.D.N.Y. 1983) 18

Cited Authorities

Page

DOCKETED CASES

Abramczyk et al. v. Big Lots Stores Inc., No. 08-cv-4330 (E.D. La. *filed* Sept. 8, 2008) 21

Adams, et al. v. Big Lots Stores, Inc., No. 08-cv-04326 (E.D. La. *filed* Sept. 8, 2008) 21

Beringer, et al. v. Big Lots Stores, Inc., No. 08-cv-4327 (E.D. La. *filed* Sept. 8, 2008) 21

Brown, et al. v. Big Lots Stores, Inc., No. 08-cv-4328 (E.D. La. *filed* Sept. 8, 2008) 21

Brown v. Dolgencorp, Inc., No. 7:02-cv-673 (N.D. Ala. *order* Aug. 7, 2006) (decertifying class) 22

Chappell, et al. v. Big Lots Stores, Inc., No. 08-cv-4329 (E.D. La. *filed* Sept. 8, 2008) 21

Gray, et al. v. Dolgencorp, Inc., No. 7:06-cv-01538 (N.D. Ala. *filed* Aug. 7, 2006) 22

FEDERAL STATUTES

29 U.S.C. § 201 *et seq.* 1, 2

29 U.S.C. § 207(a)(1) 9

29 U.S.C. § 216(b) 2, 7, 8

Cited Authorities

Page

FEDERAL REGULATIONS

29 C.F.R. § 541.1 (2003) 9

29 C.F.R. § 541.102 (2003) 10, 15

29 C.F.R. § 541.103 (2003) 11

29 C.F.R. § 541.100 (2006) 9, 11, 14

29 C.F.R. § 541.102 (2006) 15

29 C.F.R. § 541.106 (2006) 15

29 C.F.R. § 541.602 (2006) 14

29 C.F.R. § 541.603 (2006) 14

29 C.F.R. § 541.700 (2006) 11

National Retail Federation ("NRF") submits this *amicus curiae* brief in support of the petitioner, Family Dollar Stores, Inc.[1]

INTEREST OF *AMICUS CURIAE*

NRF is the world's largest retail trade association. Its membership comprises all retail formats and channels of distribution, including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores, as well as the industry's key trading partners. NRF represents an industry with more than 1.6 million retail establishments, whose sales last year alone totaled $4.6 trillion. NRF members employ more than 24 million workers—about one in five American workers. NRF also represents more than 100 state, national and international retail associations.

NRF has an interest in this action because it concerns issues of great significance to its membership and the retail industry as a whole, namely the application of the executive exemption under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), to managers of retail establishments, and the procedure used to try collective actions under the FLSA. *See* 29 U.S.C. § 216(b). Specifically, the Court must provide

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus*, its members and its counsel made such a monetary contribution.

guidance on the correct standard—if any could exist—for the lower courts to use when certifying collective actions in the context of a "primary duty" analysis. NRF maintains that if allowed to stand, the decision below will have a significantly deleterious effect on the interests of its members and the business community as a whole.

SUMMARY OF ARGUMENT

This case provides an opportunity for the Court to issue guidance on the interpretation of the "similarly situated" requirement under the Fair Labor Standards Act ("FLSA") in cases where retail employers have classified certain job titles of their managerial workforce as "exempt" from overtime requirements and that classification is being challenged on the basis of the position's "primary duty." The unique combination of the individualized analysis of each employee's "primary duty," an undefined, unworkable "similarly situated" standard, together with the representative nature of a collective action necessitates this Court's review and action. The Court is urged to provide much needed guidance to the lower federal courts regarding whether and when notice should issue and when a retailer should be required to defend a collective action.

Meeting the "similarly situated" standard under 29 U.S.C. § 216(b) is the only requirement for notice to issue to potentially thousands of managers in an exemption case. This notice provides prospective plaintiffs the opportunity to opt-in to the lawsuit. Thus, it is essential that this process—the preliminary finding

of "similarly situated" followed by notice to the putative class—focus the district court and the putative plaintiffs on the material issues that will ultimately be decided by a jury so that the representative trial can be fair and the litigation be efficient. *See Hoffman-La Roche v. Sperling*, 493 U.S. 165, 170-171 (1989). However, the material issue here—primary duty—is an intense, factual inquiry that delves into the day-to-day duties and responsibilities of each individual—not an analysis of written job descriptions or standard operating procedures that may not be a proper basis for collective treatment.

If allowed to stand, the decision below permits the default definition of "similarly situated" only by negative reference to what it "does not mean." *See Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 (11th Cir. 2008). Left with no guidance, lower courts have developed "lenient," contradictory, and unpredictable standards as to when massive groups of potential plaintiffs are "similarly situated" such that they should be given notice and an opportunity to "opt-in" to a lawsuit. *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-1214 (5th Cir. 1995); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096-1097 (11th Cir. 1996). The lenient standard for notice permits the invitation of opt-in plaintiffs on inapplicable or irrelevant grounds—such as whether they hold the same job title as the named plaintiffs—rather than whether they the possess the facts in common with the named plaintiffs that a jury will be asked to determine. After notice is issued, a retailer cannot escape the costly and protracted litigation of what is an inherently individualized assessment of the primary duty of its managerial

employees except by settling early at a high price, and even then, with no certainty or finality unless it also reclassifies the job title at issue.

This lack of a notice standard, developed over the course of time and exemplified by the *Morgan* case, impacts negatively both the courts and litigants in three distinct phases of litigation. First, historically, notice has been issued on a "very lenient" standard that some courts have held can be met based on only the pleadings and a few affidavits. *Mooney*, 54 F.3d at 1213-1214. In cases where "primary duty" is the only dispute, the notice at such an early stage necessarily focuses on issues not material to the jury or other fact-finder under the primary duty analysis. Thus, the managers opt in based on criteria (such as job classification or salaries) that do not assist in determining whether their case is one that is similar to or representative of the plaintiffs' case. The often-used rationale for the lenient notice standard is that it is "just notice" and the class may later be dismantled through decertification. However, this justification ignores the harm done by the creation of a potential thousand-plus plaintiff class. Court approval of notice often amounts to "game over" for retailers because the extraordinary cost of litigating the conditional certification to stop a representative trial is "rewarded" by obtaining decertification and then defending thousands of individual cases created by the initial notice. If the case goes forward to a "representative trial," the retailer is faced with the prospect of proving the exemption defense on a manager-by-manager basis. The "lenient" standard results in no standard where the inquiry is the highly-individualized "primary duty" of an employee. Moreover,

there is no immediate appellate jurisdiction to review the initial certification decision—it is a decision cast in stone. *See Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 548 (6th Cir. 2006) (applying *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949)); *Baldridge v. SBC Commc'ns, Inc.*, 404 F.3d 930, 932-33 (5th Cir. 2005). Many retailers may be forced to succumb to the strong economic incentive to settle as opposed to defend themselves regardless of the lawfulness of their classification decisions.

Second, the standard for determining "similarly situated" at the "second step" decertification stage must be defined. For example, the court below looked, in large part, at factors that were themselves consistent with the FLSA but were "uniform" in their application—*e.g.*, the employers' decision to classify managers as exempt, the manager's job description, and the existence of standard operating procedures. Such standard procedures are not what the jury will be asked to make findings upon, and the retailer cannot use them to support its exemption classification. Thus, the application of the current similarly "situated standard" accepts non-material "evidence" as the glue that binds a class for the upcoming representative trial. The irony is that while these standardized business procedure documents are lawful and necessary to every retailer's survival, regardless of their size, the employer is not allowed to rely upon them to establish the exempt nature of the job—thus creating a "one-way street" of analysis. These documents are also the basis for courts to bind the retailer to a trial by a group of plaintiffs whose success on the merits is based on the individual conduct of a select few. Without a proper standard that

correlates the definition of "similarly situated" to the relevant ultimate inquiry, the retailer is faced with incredible costs and having to overcome hand-picked plaintiffs who in fact may not accurately represent the rest of the class.

Finally, the lack of a proper standard results in a tortured attempt to try the "similarly situated" plaintiffs together on the "primary duty" evaluation. The Eleventh Circuit concluded that since the employer has the burden to prove the exemption's required elements, then the defendant should call all of the plaintiffs and opt-ins to show they all are exempt. *See Morgan*, 551 F.3d at 1278. The cost of trying many individual cases—even collectively—and bringing in all collateral witnesses necessary to prove what happens during the workday is so prohibitive as to be fundamentally a lack of due process. And if required to call and prove the exemption regarding each plaintiff at trial, the proceedings cannot be judicially efficient. Retailers, whether the largest multi-department stores, such as Home Depot or Wal-Mart or the smallest stand-alone "small box" retailers, often cannot risk the exposure and litigation costs. As a practical matter, the procedural handling of these cases effectively writes the executive exemption out of the FLSA.

Moreover, the decision will not be limited to one circuit. Managers employed by national retailers with standard operating procedures and job descriptions are, by definition, now "similarly situated" in the Eleventh Circuit. Failure to review this decision and to announce a proper standard in the context of primary duty likely will cause virtually all such cases to be brought in the

Eleventh Circuit and will effectively create an unreviewable national standard. Retailers will be forced to settle—and/or reclassify its employees—and no other circuit will likely review the standard even if another retailer is willing to risk its whole business model and incur the enormous liability exposure that goes with it.

REASONS FOR GRANTING THE PETITION

I. THE LACK OF MEANINGFUL, CLEAR STANDARDS FOR ASSESSING WHEN EMPLOYEES ARE "SIMILARLY SITUATED" IN "PRIMARY DUTY" CONTEXT CREATES A MAGNET FOR WASTEFUL LITIGATION.

Retail employers and the lower federal courts need a clear and meaningful standard for what constitutes a "similarly situated" group of employees for the purpose of collective action certification under 29 U.S.C. § 216(b) in executive exemption cases involving the central issue of "primary duty." As the Eleventh Circuit candidly explained in this case, "we [have] explained what the term does not mean—not what it does." *Morgan*, 551 F.3d at 1260.[2]

---

[2] The Eleventh Circuit made clear that there is no defined standard to be followed at either the conditional or decertification stages of collective action procedure, stating: "We have described the standard for determining similarity, at this initial stage, as 'not particularly stringent,' 'fairly lenient,' 'flexible,' 'not heavy,' and 'less stringent than that for joinder under Rule 20(a)'". *Id.* at 1260-61; "The second stage [of certification] is less lenient, and the plaintiff bears a heavier burden . . . Exactly how much less lenient we need not specify, (Cont'd)

The Petition should be granted despite the lack of an observable circuit-level split in authority on the treatment of "primary duty" under the "similarly situated" provisions of § 216(b) because the lack of "split" has certainly proven to be no barrier to inconsistent rulings—even among different cases involving the same employer and same job title. *See* Pet. at p.17-18.[3] The refusal of courts in other circuits to certify collective actions—involving the same company and job title at issue here[4]—is a clear illustration of the

---

(Cont'd)
though logically the more material distinctions revealed by the evidence, the more likely the district court is to decertify the action." *Id.* at 1261; "We also refused to 'specify how plaintiffs' burden of demonstrating that a collective action is warranted differs at the second stage.'" *Ibid.*; "[T]he similarities necessary to maintain a collective action under § 216(b) must extend beyond the mere facts of job duties and pay provisions' and encompass the defenses to some extent." *Id.* at 1262 (internal cites omitted from all).

[3] Citing cases refusing certification or decertifying collective actions because of the individual inquiry required, including *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 586-87 (E.D. La. 2008); *Smith v. Heartland Auto. Servs.*, 404 F. Supp. 2d 1144, 1151-1154 (D. Minn. 2005); *Riech v. Homier Dist. Co.*, 362 F. Supp. 2d 1009, 1013-1014 (N.D. Ind. 2005); *Mike v. Safeco Ins. Co.*, 274 F. Supp. 2d 216, 220-21 (D. Conn. 2003); *Morisky v. Pub. Serv. Elec. & Gas*, 111 F. Supp. 2d 493, 498-99 (D.N.J. 2000).

[4] *See* Pet. at p. 18 (noting that within the past two years, district courts within the Fourth Circuit have twice denied certification of collective actions involving Family Dollar store managers).

uncertainty resulting from lack of clarity regarding application of "similarly situated" in primary duty cases. Despite no split of "circuit authority" there is an undeniable "split of reasoning" among the lower courts resulting from the lack of guidance thus causing the divergent rulings. Because the decision below has offered nothing more than a reference to language in other non-FLSA, non-primary duty opinions as to what "similarly situated" does *not* mean, the lack of clarity warrants this Court's guidance. *See Morgan*, 551 F.3d at 1260.

A. The FLSA's Executive Exemption, "Primary Duty" And Collective Action Provisions.

Although the FLSA requires that employees be paid "time and a half" for work over forty hours per week, the FLSA provides an exemption from its overtime requirement for "any employee employed in a bona fide executive . . . capacity." *See* 29 U.S.C. § 207(a)(1). In order to qualify for the executive exemption, the employee must be one: (a) whose compensation is on a salary basis of not less than $250 per week, (b) who regularly directs the work of two or more other employees, and (c) whose primary duty consists of the management of a recognized subdivision of the employer's enterprise.[5]

---

[5] This is known as the "short test" and was applicable until August 23, 2004. At that time, the Department of Labor amended the regulations associated with the executive exemption. The minimum salary requirement was increased to $455/week and an additional element was added: the authority

(Cont'd)

See 29 C.F.R. § 541.1 (2003) and 29 C.F.R. § 541.100 (2006). Typically, the sole legal issue in executive exemption misclassification cases is whether "management"[6] was each plaintiff's "primary duty."

The Department of Labor's regulations further provide guidance when determining "primary duty" under the executive exemption. When the percentage of time spent on "non-managerial" duties is more than 50%, the regulations instruct that four other factors must be considered: (1) relative importance of managerial duties to non-managerial tasks; (2) the frequency with which the employee exercises discretionary power; (3) the employee's relative freedom from supervision; and (4) the relationship between the

---

(Cont'd)

to hire or fire other employees or whose suggestions as to hiring, firing advancement, promotion or any other change of status of other employees is given particular weight.

[6] The DOL defines management duties to include: interviewing and selecting employees; training employees; setting employees' hours; setting or adjusting employees' rates of pay; directing the work of employees; maintaining sales records/reports; appraising employees' job performances; recommending employees for promotions; handling employee complaints or grievances; planning the work; apportioning the work among the employees; controlling flow of merchandise through store; providing safety of the employees; providing security of the property; controlling budgets; and monitoring and implementing legal compliance measures. *See* 29 C.F.R. § 541.102 (2003) and (2006).

employee's salary and the wages paid employees doing similar non-exempt work. *See* 29 C.F.R. § 541.103 (2003).[7]

Pursuant to 29 U.S.C. § 216(b), an employee may maintain an action to recover overtime on behalf of himself or other employees "similarly situated". The FLSA does not define the term "similarly situated." Left with no direction, courts have attempted to fashion their own meaning. Whatever definition chosen by a court, most have agreed that the decision as to whether there are "similarly situated" individuals is addressed at two stages. *See, e.g.*, *Mooney*, 54 F.3d at 1213-1214; *Grayson*, 79 F.3d at 1097.

First, at the "notice" stage and applying a "lenient," "not particularly stringent," "not heavy," "flexible" standard, plaintiffs show they are "similarly situated with regard to their job requirements and pay provisions." *Morgan*, 551 F.3d at 1260-1262. At this early stage, courts determine whether a group of employees should be invited to join the lawsuit. The second determination occurs "once the case is ready for trial," and applies a "less lenient" standard based on the evidence revealed during discovery—after all potential class members have decided whether to join the lawsuit. *Id.* at 1261. The ultimate certification determination can be reviewed—after trial—for "abuse of discretion" as to whether there was enough evidence to establish whether the plaintiff employees are similarly situated

---

[7] Under 29 C.F.R. § 541.700 (2006), revised effective August 23, 2004, one of the factors has since been eliminated from the regulations—the frequency with which the employee exercises discretionary powers. *Cf.* 29 C.F.R. § 541.103 (2003).

to one another, but only long after the notice has already been issued and potentially thousands of individuals have joined. *Id.* at 1260.

B. It Is Critical That The Court Define The Similarly Situated Standard To Reconcile Collective Actions With The Individualized Nature of The "Primary Duty" Analysis.

The problem of an uncertain and ill-defined "similarly situated" standard is compounded by the leniency with which courts facilitate notice to potential opt-in plaintiffs. Ideally, the district judge would serve the role of gatekeeper for the purpose of efficiently managing the joinder of parties. *See Hoffman-La Roche*, 493 U.S. at 170-171 ("the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way"). Instead, the "lenient" opt-in notice is liberally granted, "usually based only on the pleadings and any affidavits which have been submitted." *Mooney*, 54 F.3d at 1213-1214.

The sheer volume of potential plaintiffs—and the prospect of years of expensive, protracted discovery and pre-trial proceedings—forces employers to consider capitulation regardless of the merits of the exemption claim. This is especially the case given that there is no interlocutory review and there is no way to "un-notice" a plaintiff once he or she has opted in. *See Comer*, 454 F.3d at 548; *Baldridge*, 404 F.3d at 932-33. Employers are thus faced with a difficult choice between engaging

in "bet the company" litigation, negotiating a large settlement based largely on the unpredictable and uncertain standard of class certification, and/or reclassifying exempt employees who may well properly be classified that way, not because they are required by law, but in the interests of resolving litigation risks. *Cf. Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008) (noting that with respect to the pressure to settle cases with unpredictably large punitive damage awards, "[t]he real problem, it seems, is the stark unpredictability . . . Courts of law are concerned with fairness as consistency").

As a matter of fundamental fairness, a "fairly lenient standard" for issuing notice should at least be defined by what it "is," not what it "is not"—particularly when the ramifications can be so significant. And that standard, even more if lenient than under Federal Rule of Civil Procedure 23, should at least require a showing of factual allegations supported by evidence that would establish a violation of law without resort to highly variable individualized analysis. Only then would the resulting discovery costs and expansion of the litigation be justified. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007):

> it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago . . . 'a district court must retain the power to insist upon some specificity in pleading before allowing a

> potentially massive factual controversy to proceed'

(internal citations omitted). A review of the factors used in making the primary duty determination shows why no single person can be representative of all. *See* discussion in part I (A), *supra*. Some employees may exercise discretion frequently; some may not. A store manager in Boston, Massachusetts may be relatively free from supervision while another manager in Pascagoula, Mississippi may not be. Some managers will have personally interviewed and hired dozens of employees, and others hired none—and perhaps for different reasons not related to the exemption. Yet, each side will be motivated to hand-select managers at trial who are likely to be the most polarized examples and thus the *least* representative of all.

In certain situations, in which notice is issued on the basis of the factors to be decided by a jury, a collective action can be an appropriate mechanism to gain the efficiencies of representative litigation. For example, if there was an alleged policy or practice of docking exempt employees' salaries in violation of the "salary basis" test,[8] a court might find that a group of similarly situated employees is impacted by the policy and grant notice. The court's only inquiries then would be to find whether the practice actually occurred and whether each person in the class was impacted. Employees receiving notice would know if the allegations applied to them, as they would know with

---

[8] *See* 29 C.F.R. §§ 541.602-.603 (2006).

great certainty whether or not their pay had ever been "docked." Thus, in some cases, the lack of a workable definition for "similarly situated" would not prevent courts from managing efficient collective actions and providing class members with sufficient information to make informed decisions about whether to participate. *See Hoffman-La Roche*, 493 U.S. at 170-171.

But collective actions challenging whether a manager's "primary duty" is management are completely different from the example above, and expose the Achilles heel of the undefined "similarly situated" standard. The Eleventh Circuit's own recent precedent further reinforces the notion that a retail employer can only defend an executive exemption case on a fact-intensive, individualized basis. As explained in *Rodriguez v. Farm Stores, Inc.*, primary duty is analyzed by reviewing the specifics of each of the employees' duties, based on all facts in a particular case, and is ultimately found in the details of the job. 518 F.3d 1259, 1264 (11th Cir. 2008) (affirming jury verdict finding 26 store managers to be non-exempt, in a non-collective action in which each plaintiff testified).

Thus, in a primary duty case, the court has no discrete policy or practice that can be identified and litigated. There are over 20 non-exclusive management duties described in the Department of Labor's regulations and five non-exhaustive factors to be considered, none of which are dispositive or weighted in any particular order. *See* 29 C.F.R. § 541.102 (2003); 29 C.F.R. § 541.103 (2003); 29 C.F.R. § 541.102 (2006); 29 C.F.R. § 541.106 (2006). Courts are simply left to ask each prospective opt-in whether each believes that his or her primary duty was management, a determination

that is left for each recipient to interpret when deciding whether to join the suit.

If district courts are to authorize nationwide notice on the basis of non-dispositive, subjective allegations of misclassification of exempt employees, retailers will have no meaningful notice as to which practices may lead to substantial exposure under the FLSA. Individuals receiving notice also have no reasonable basis upon which to make an informed decision as to whether to join the subject litigation. Significantly, once the nationwide notice is ordered, the pressure on the employer to settle even meritless claims increases considerably—all without the plaintiffs having to submit *any* evidence of an illegal practice, and with no guidance as to the propriety of the classification in the first instance.

Indeed, the court below actually held that the uniformity of the *employer's* job descriptions, corporate polices, and operating procedures supported the "substantial similarity" of the *employees*. *Morgan*, 551 F.3d at 1242, 1245, 1247-48. Virtually *all* retail and service chains with nationwide operations have long used highly-detailed, uniform, and regimented operating policies and procedures. *See, e.g., Donovan v. Burger King*, 675 F.2d 516, 521 (2d Cir. 1982) ("the economic genius . . . lies in providing uniform products and service economically in many different locations and that adherence by Assistant Managers to a remarkably detailed routine is critical to commercial success"). Under the decision below, however, even if nothing in a retailer's standardized job descriptions, policies or procedures is found to actually contradict the application of the executive exemption,

the very *existence* of those uniform practices may be used to support the determination that all store managers were "similarly situated" with respect to their allegations of misclassification. But, as the litigation proceeds, this uniformity serves no use to the retailer who must nonetheless defend the merits of the exempt classification decision individually. At the point of trial, courts turn their attention to the details of each employee's duties and state that job titles and concepts such as being "in charge of the store" are not material. *See, e.g., Rodriguez*, 518 F.3d at 1264. The basis for the purported similarity thus used to form the class in the first instance is never tried and cannot be used as a defense. [9]

The "representativeness" concern can best be illustrated by the example of ineffective or incompetent manager, whose exemption claim would otherwise be denied because of his or her failure or refusal to perform the managerial tasks required of the job.[10] The absence

---

[9] The unworkable standard is compounded by the fact that courts have made clear that mere job titles or job descriptions cannot be used to establish the exemption defense. *See, e.g., Ale v. Tenn. Valley Auth.*, 269 F.3d 680, 688-89 (6th Cir. 2001); *Reyes v. Texas EZPawn*, 459 F. Supp. 2d 546, 553 (S.D. Tex. 2006); *Johnson*, 561 F. Supp. at 579.

[10] *See, e.g., Stein v. J.C. Penney Co.*, 557 F. Supp. 398, 405 (W.D. Tenn. 1983) ("the plaintiff . . . spent an unusually large amount of time doing non-exempt work. But to the extent that is true, it was because of his own failure or inability to direct others . . . His failure to properly apportion the work, as was

(Cont'd)

of a clear certification standard allows these same managers to be the instigators of a collective action—assuming they were uniformly classified and subject to a uniform standard operating procedure—a burden easily met by most retail managers. The irony is that these individuals, who could not prevail on their own accord, could nonetheless be the genesis of a thousand-plus person collective action *and* recover damages based on other individuals who may have actually been misclassified. Plainly, such a result was not contemplated by the courts or the drafters of the FLSA.

The potential impact of this ruling on virtually every retailer nationwide can be scarcely overstated. Even if a retailer's policies clearly dictate that a class of employees should be performing exempt managerial duties, the mere *uniformity* of those policies can still be used to force that retailer to litigate against thousands of employees at the expense of millions of dollars and the risk of hundreds of millions in potential liability.[11] Under these circumstances, the additional pressure to reclassify the employees is so great as to

---

(Cont'd)

within his discretion to do, does not convert an exempt job into a non-exempt one"); *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1325 (S.D.N.Y. 1983) (in the context of analysis of the "bona fide executive" exemption under ADEA, holding that "an unresourceful employee should not benefit in this regard from his failure to perform adequately the duties that are expected of him . . . an employee would not escape the exemption because [of] his lack of energy, imagination or judgment").

[11] *See, e.g.*, *Morgan*, 551 F.3d at 1242, 1245, 1247-48. *Ale*, 269 F.3d at 688-89; *Reyes*, 459 F. Supp. 2d at 553 (S.D. Tex. 2006); *Johnson*, 561 F. Supp. 2d at 579.

practically eliminate the viability of the exemption under the regulations with regard to first-line exempt managers. From the retailers' perspective, reclassification may be the only alternative to having a hodgepodge of plaintiffs' claims joined under standards more lenient than required by the Federal Rules of Civil Procedure—and the ensuing requirement to call and prove the exemption as to all in one case, all while expending tremendous resources.

II. TWO-STEP REVIEW OF CERTIFICATION DOES NOT CURE THE LACK OF A CLEAR STANDARD

As the Eleventh Circuit noted in this case, the procedural choice ultimately created by the "lenient" conditional certification was "whether the case should proceed as 1,424 individual actions" or as a single collective action tried on the basis of representative testimony. *Morgan*, 551 F.3d at 1245. Thus, initial certification has far more implications than "just notice." It is a decision likely to result in the irreversible magnification of the overall size of the litigation. And while the trial of thousands of individual cases seems inefficient and anomalous, it is effectively required where district courts have leniently granted nationwide notice in executive exemption cases only to conclude much later that a "similarly situated" finding was unwarranted.

Moreover, an employer "cannot rely on an insufficient number of witnesses being called by the Plaintiffs to meet [its] burden of proof on its own affirmative defense." *Morgan*, 551 F.3d at 1278. Thus,

an employer's only means of countering the hand-selected plaintiffs who testify at trial is to depose as many as possible (or permitted by the court) and then call the ones most likely to meet the requirements of the exemption. But how many employees must a defendant call in order to solidly convince a fact finder that the hundreds of unseen others are also exempt? As seen in *Johnson v. Big Lots Stores,* when the plaintiffs'/opt-ins' testimony differs, the result is that nothing consistently "representative" emerges. *See Johnson*, 561 F. Supp. 2d at 585. In such a case, the only proper result is decertification—and the trial thus results is a draw, and the goal of "judicial efficiency" is thwarted.

In the case below, the district court concluded that the thousands of plaintiffs and opt-ins were sufficiently similar such that each did not require his or her own trial. But other courts have come to differing conclusions—even *after* denying decertification motions. In *Johnson*, an FLSA collective action was brought by assistant store managers who alleged that they were misclassified as exempt. *Id.* at 569. Although their formal job descriptions included managerial responsibilities, the plaintiffs contended that their actual managerial duties were not reflective of management and that, under strict corporate guidelines, they mainly performed nonexempt tasks that had little to do with managing the store. *Ibid.* Under the lenient standard of conditional certification, the court facilitated notice of the lawsuit to assistant store managers employed by Big Lots during a three and a half year period. *Ibid.*

Following the opt-in of over 1,200 plaintiffs and depositions of a dozen opt-ins, the court denied Big Lots'

motion to decertify the class, based on "strong similarities in job duties among those plaintiffs deposed" and also based on the "plaintiffs' claim that Big Lots maintained a *de facto* policy and practice of misclassifying the ASM job position." *Id.* at 570. At trial, the court heard seven days of testimony which revealed that the plaintiffs had no evidence that Big Lots sought to consciously deny managerial responsibilities to the plaintiffs. *Id.* at 579. Rather, the "opt-in plaintiffs' characterizations of their day-to-day work activities presented through trial erased the Court's earlier understanding that plaintiffs were similarly situated. What became obvious after the Court considered all of the evidence is that the 'representative' testimony is not representative of plaintiffs' experiences." *Ibid.* Accordingly, the *Johnson* court was left with no choice but to decertify the class at that time and thereby set the wheels in motion for the filing of 212 individual FLSA exemption claims[12] from the remaining 936 *Johnson* opt-in plaintiffs.[13]

---

[12] *See Adams, et al. v. Big Lots Stores, Inc.*, No. 08-cv-04326 (E.D. La. *filed* Sept. 8, 2008) (85 decertified opt-ins); *Beringer, et al. v. Big Lots Stores, Inc.*, No. 08-cv-4327 (E.D. La. *filed* Sept. 8, 2008) (21 decertified opt-ins); *Brown, et al. v. Big Lots Stores, Inc.*, No. 08-cv-4328 (E.D. La. *filed* Sept. 8, 2008) (4 decertified opt-ins); *Chappell, et al. v. Big Lots Stores, Inc.*, No. 08-cv-4329 (E.D. La. *filed* Sept. 8, 2008) (23 decertified opt-ins); *Abramczyk et al v. Big Lots Stores Inc.*, No. 08-cv-4330 (E.D. La. *filed* Sept. 8, 2008) (79 decertified opt-ins).

[13] *See Johnson*, 561 F. Supp. 2d at 569 (collective proceeding involved 936 of approximately 1,200 individuals who consented to opting in to the collective action).

Similarly, in *Brown v. Dolgencorp, Inc.*, a collective action filed in 2002 and involving exemption claims of Dollar General store managers, the court decertified the class at trial after four years of litigation, hundreds of depositions, and the expenditure of substantial resources.[14] The legacy of *Brown* is that approximately 1,400 decertified opt-in plaintiffs are now pursuing individual FLSA actions that have been and will be transferred to districts across the country.[15]

These outcomes demonstrate the inherent flaw in leniently granting notice in primary duty cases where the only thing tying the plaintiffs together is their subjective belief that they are nonexempt, even though no material facts are alleged that constitute FLSA violations. The impact to retailers is significant. It chills the use of a long-standing, lawful exemption provided by Congress. Retailers now know that even if they classify management positions correctly, they are still subject to class litigation being certified, with all of its inherent costs, and that there will be no meaningful review of the decision. Once at trial, employers are required to defend the application of the exemption on an individual, case-by-case basis. If they prevail at the decertification stage, they are faced with defending the

---

[14] *See Brown v. Dolgencorp, Inc.*, No. 7:02-cv-673, (N.D. Ala. *order* Aug. 7, 2006) (decertifying class).

[15] *See Gray, et al. v. Dolgencorp, Inc.*, No. 7:06-cv-01538 (N.D. Ala. *filed* Aug. 7, 2006) (2,485 individual plaintiffs); *see also, Gray*, Dkt. No. 85 "Joint Proposed Plan for Transferring Remaining Cases" (N.D. Ala. *joint motion submitted* Nov. 21, 2008).

defeated class members across the country and expending millions of dollar on further individualized discovery and trials in the process. Even if retail employers settle these cases, they have bought no finality, as future employees and those not opting in will be encouraged to freely file new collective actions, unless the employer ultimately re-classifies its employees.

This problem vexing retail employers requires an immediate a solution. One can readily be provided by this Court with the formation of a clear standard for determining when employees are "similarly situated" with respect to determinations of "primary duty" under the FLSA.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD E. MANTHEY
Counsel of Record
JOEL S. ALLEN
JASON R. ELLIOTT
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
(214) 466-4000

Counsel for Amicus Curiae